

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID CAYETANO,

Defendant and Appellant.

B209621

(Los Angeles County
Super. Ct. No. YA052226)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

Sharon Fleming, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

David Cayetano appeals from the judgment entered following his plea of no contest to attempted second degree murder (Pen. Code, §§ 664/187),¹ during the commission of which a principal was armed with a firearm (§ 12022, subd. (a)(1)). The trial court sentenced Cayetano to 10 years in state prison. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

*1. Facts.*²

At approximately 11:15 a.m. on March 24, 2002, Los Angeles County Deputy Sheriff Sean Hoodye and his partner, Deputy Hansen, responded to a call reporting shots fired at 11828 Berrendo Avenue in Los Angeles. There, the deputies met Lavell Houston.

Houston told the deputies that he and a friend were sitting in the friend's car parked in front of the house at 11828 Berrendo listening to music. Houston was in the passenger's seat and his friend was in the driver's seat. A gray Chevy drove by, passed once, turned around and passed by again. On its second pass, the Chevy pulled up behind the car in which Houston and his friend were sitting. There were two people in the Chevy and the person in the passenger seat yelled out, asking Houston if he and his friend were from the Raymond gang. Houston replied that they were not.

The passenger in the gray Chevy then looked over at the doorway to the house at 11828 Berrendo, where Gary Bradley was standing. The individual then asked Bradley if he belonged to the Raymond gang. When Bradley replied that he did not, the individual driving the Chevy pulled out and began to drive away. The passenger then yelled out, “ ‘Fuck Raymonds,’ ” pointed a handgun out the car window, and began firing. The individual aimed at Houston and fired several rounds. He then aimed at Bradley and fired several more rounds. In total, the individual fired between six and ten rounds. When Deputy Hoodye and his partner checked the area, they found bullet holes in the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The facts have been taken from the transcript of the preliminary hearing.

house and cars parked nearby as well as in the car in which Houston and his friend had been sitting³

Los Angeles County Sheriff's Deputy Larry Quirol testified that at approximately 11:15 a.m. on March 24, 2002, he and his partner, Deputy Lopez, were on patrol near 115th and Budlong, which is approximately one and one-half blocks from 11828 Berrendo. When Quirol heard what sounded like three shots fired, he headed toward Berrendo Street. As the deputy approached 115th and Budlong, he saw a gray, Chevy Caprice occupied by the driver and one passenger driving north on Budlong. Quirol let the car pass him, then followed the vehicle until it eventually stopped at 110th and Vermont Avenue. Quirol then activated his lights and initiated a traffic stop. When Quirol opened his door and began to get out of his patrol car, the gray Caprice took off, accelerating as it went. Quirol got back into his car and followed the Chevy "through various streets," ultimately ending up on 107th street, just west of Budlong. At that point the two occupants got out of the Chevy and ran. The passenger, Thompson, was detained by Deputy Lopez.

Quirol pursued the driver of the vehicle, appellant, Cayetano. However, as Quirol attempted to apprehend Cayetano, he "evaded [the deputy's] grasp" by going over a wall. After Cayetano climbed over the wall, Quirol lost sight of him. Quirol did, however, see Cayetano's face and was able to identify him in a photographic line-up or "six pack."

At some point, Hoodye took Houston and Bradley to the location where Thompson was being held. Both Houston and Bradley first identified the gray Chevy as the car from which the shots had been fired. In addition, both Houston and Bradley identified Mark Thompson as the individual who had fired the shots from the car.

A search of the Chevy revealed a black, semiautomatic nine-millimeter Taurus pistol.

³ Hoodye testified that the deputies recovered casings and a "slug" from "the bed [in] 11828 [Berrendo] which was the victim's [(Bradley's)] residence."

Los Angeles County Sheriff's Sergeant Wendy Zolkowski was the investigating officer for the case. As one of her duties, Zolkowski interviewed Thompson regarding the shooting incident which took place on Berrendo. Thompson admitted that he was the passenger in the gray Chevy and told Zolkowski that the driver of the vehicle was known as Baby T. Both Thompson and Baby T. are from the Harvard gang, which is a rival of the Raymond Avenue Crips. Zolkowski obtained a photograph of Cayetano, or Baby T., and showed it to Thompson. After viewing the photograph, Thompson indicated that it depicted the individual who had been driving the gray Chevy on March 24, 2002. Zolkowski then took the photograph and placed it in a six-pack, or group of six photographs. Deputy Quirol identified the photograph of Cayetano as that of the driver of the Chevy.

2. Procedural history.

On June 19, 2007, Cayetano was charged by information with two counts of attempted, willful, deliberate, premeditated murder (§§ 664/187, subd. (a)) and two counts of shooting at an inhabited dwelling (§ 246). It was further alleged that, as to counts one to four, in the commission and attempted commission of the crimes alleged a principal was armed with a firearm (§ 12022, subd. (a)(1)).

At proceedings held on April 24, 2008, the prosecutor indicated a negotiated disposition had been reached. Cayetano was to plead guilty or no contest to count one, attempted murder. The People would strike the premeditation allegation and Cayetano would be sentenced to the upper term of nine years in prison for the offense. In addition, Cayetano would admit that a principal was armed with a firearm during the commission of the attempted murder. For the admission, an additional year would be added to his sentence. All other allegations would be dismissed and, in total, Cayetano would be sentenced to 10 years in prison. The prosecutor explained that “[t]he reasons for the plea agreement is number one, the age of the case [and] [t]his defendant was the driver. He was not the shooter. The shooter was convicted and was sentenced to 10 years to life. . . . [¶] And so based on that, we determined that this would be the most appropriate offer to give him at this time.”

Defense counsel indicated he had no objection to the disposition. He, however, had concerns regarding the number of presentence custody credits Cayetano would be awarded since he had been “arrested on an extradition warrant from the State of California to Las Vegas, Nevada.” Counsel continued, “[At] the extradition proceedings, he waived the extradition hearing. He didn’t fight it. So by law, he’s entitled to credits. [¶] It’s complicated by the fact that he apparently had a matter in Las Vegas for which he was convicted, got probation, and got credits. So at this point I can’t verify that, and I can’t ascertain the time credits. [¶] So I would ask that on the plea and time of sentencing, it be referred out to probation for a supplemental probation report.” The trial court responded, “I’ll be happy to do that. My understanding of the status of the law with regards to time credits is that the defendant has the burden of being able to establish that but for this case, he otherwise would have been free from custody. [¶] Are you in agreement?” Defense counsel responded, “Yes.” The trial court then stated, “Okay. So I’m happy to ask the probation department for its assistance. But ultimately, Mr. Cayetano will have to demonstrate that but for the extradition warrant, he otherwise would have been free.”

After waiving his right to a jury trial, his right to confront and cross-examine the witnesses against him, his right to subpoena witnesses and to put on an affirmative defense and his privilege against self-incrimination, Cayetano pleaded no contest to attempted murder in violation of sections 664 and 187, subdivision (a) and admitted that a principal was armed with a firearm during the commission of the offense within the meaning of section 12022, subdivision (a)(1).

Following entry of Cayetano’s plea, the trial court ordered the probation department to prepare a supplemental report “specifically to address the defendant’s time credits, [to] determine when he was taken into custody, when he was extradited on this case [and] whether or not he otherwise would have been at liberty were it not for the warrant in this matter.”

At proceedings held on May 22, 2008, the trial court sentenced Cayetano to the upper term of nine years in prison for his conviction of attempted murder. In addition,

the court imposed a one-year enhancement because a principal was armed with a firearm during the offense. In total, Cayetano was sentenced to 10 years in prison. Cayetano was awarded presentence custody credit for 406 days actually served and 60 days of good time/work time, for a total of 466 days. The trial court ordered Cayetano to pay a \$200 restitution fine (§ 1202.4, subd. (b)), a stayed \$200 parole revocation restitution fine (§ 1202.45), and a \$20 court security fee (§ 1465.8, subd. (a)(1)). The trial court then dismissed all remaining counts and allegations.

Cayetano filed a timely notice of appeal and request for a certificate of probable cause on July 16, 2008. On July 22, 2008, the trial court denied Cayetano's request for a certificate of probable cause.

This court appointed counsel to represent Cayetano on appeal on September 25, 2008.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed November 21, 2008, the clerk of this court advised Cayetano to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied Cayetano's counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.